

No. 94329-0
SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Charles Fletcher,

Petitioner/Appellant.

Spokane County Superior Court

Cause No. 11-1-02625-7

The Honorable Judge Salvatore Cozza

Petitioner's Supplemental Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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STATEMENT OF FACTS

Charles Fletcher is a patient at Eastern State Hospital. CP 1-3. He was committed to the hospital in 2013, pursuant to a judgment and order of acquittal of felony charges by reason of insanity. CP 2.

Mr. Fletcher is currently unrepresented at the trial level. CP 10-14. He is financially eligible for appointed counsel. CP 24-25. In 2015, he wrote a letter to the judge who signed his commitment order, “respectfully asking the Court for a conditional release” and for the appointment of counsel. CP 10. He enclosed a “Motion for Conditional Release and for Appointment of Public Defender,” as well as a certificate of indigency. CP 11-13.

The court did not appoint counsel. CP 6. Instead, the court directed Mr. Fletcher to apply to the DSHS secretary for conditional release under RCW 10.77.150(1) and enclosed a copy of that statute. CP 6-7.

The judge informed Mr. Fletcher he would not consider appointing counsel until Mr. Fletcher had applied to the secretary. CP 6. The judge made no mention of RCW 10.77.200(5), which authorizes a patient to seek conditional release directly from the superior court. CP 6. The Court of

Appeals affirmed in a split decision, and the Supreme Court granted review of two issues:

1. Does the statutory promise of appointed counsel for insanity acquittees “at any and all stages of the proceedings” require appointment of counsel for an indigent patient seeking conditional release?
2. May an insanity acquittee petition the Superior Court directly for an order of conditional release, or must the patient instead apply first to the Secretary of the Department of Social and Health Services?

ARGUMENT

MR. FLETCHER IS ENTITLED TO THE ASSISTANCE OF APPOINTED COUNSEL “AT ANY AND ALL STAGES OF THE PROCEEDINGS,” INCLUDING THE PREPARATION OF A PETITION OR ADMINISTRATIVE APPLICATION FOR CONDITIONAL RELEASE.

Charles Fletcher, a patient at Eastern State Hospital, has the right to appointed counsel at “any and all stages of the proceedings” relating to his commitment. RCW 10.77.020(1). He asked the trial court to appoint counsel to help him seek conditional release. CP 10-14. Because a request for conditional release is a “stage[] of the proceedings,” he is entitled to the appointment of counsel. The attorney can help him prepare a petition or an administrative application for conditional release. RCW 10.77.020(1). The trial court should have appointed counsel instead of directing to first make a pro se application to the secretary of DSHS. CP 6-14. The court’s refusal to appoint an attorney violated Mr. Fletcher’s right

to the assistance of counsel at “any and all stages of the proceedings.”

RCW 10.77.020(1).

- A. The plain language of RCW 10.77.020(1) requires the appointment of counsel at “any and all stages of the proceedings.”

RCW 10.77.020(1) provides as follows:

At any and all stages of the proceedings pursuant to this chapter, any person subject to the provisions of this chapter shall be entitled to the assistance of counsel, and if the person is indigent the court shall appoint counsel to assist him or her.

RCW 10.77.020(1). Furthermore, the statute only allows waiver of this right if the court makes a specific finding of competence after (at a minimum) considering the patient’s understanding of five factors.¹ RCW 10.77.020(1).

In interpreting a statute, the court’s duty is to “discern and implement the legislature’s intent.” *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004).

¹ These include “(a) The nature of the charges; (b) The statutory offense included within them; (c) The range of allowable punishments thereunder; (d) Possible defenses to the charges and circumstances in mitigation thereof; and (e) All other facts essential to a broad understanding of the whole matter.”

The plain language of RCW 10.77.020(1) requires appointment of counsel for indigent patients in Mr. Fletcher’s position. Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *see also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) (“Plain language does not require construction.”). A court “will not engage in judicial interpretation of an unambiguous statute.” *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011). Nor may a reviewing court “add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 202, 172 P.3d 329 (2007).

The legislature’s use of the phrase “any and all” suggests an intent to be as comprehensive as possible. The word “any” includes among its meanings “every; all.” *Dictionary.com Unabridged*, Random House, Inc.²

² Available at <http://www.dictionary.com/browse/any> (last accessed June 30, 2016.)

The word “all” means, *inter alia*, “the whole number of; ...the greatest possible; ... every; ... any; any whatever.” *Dictionary.com*.³ Thus the phrase “any and all” establishes the legislature’s intent to create an all-inclusive right applicable to anything that can be characterized as a “stage” of the “proceedings.”

The word “stage” means (among other things) “a single step... in a process; a particular phase... in a process.” *Dictionary.com*.⁴ Nothing about this definition suggests a limitation on the right to counsel.

“Proceedings” can mean “a series of activities or events; happenings.” *Dictionary.com*.⁵ The Supreme Court has characterized the word “proceedings” as a “broad term.” *In re Det. of Kistenmacher*, 163 Wn.2d 166, 171, 178 P.3d 949 (2008).

The statute’s plain language is clear and unambiguous. The legislature has directed courts to appoint counsel “at any and all stages of the proceedings pursuant to [Chapter 10.77 RCW].” RCW 10.77.020(1). This requires the appointment of counsel at every step in the series of events that make up proceedings under Chapter 10.77 RCW.

³ Available at <http://www.dictionary.com/browse/all> (last accessed June 30, 2016).

⁴ Available at <http://www.dictionary.com/browse/stage> (last accessed June 30, 2016).

⁵ Available at <http://www.dictionary.com/browse/proceeding> (last accessed June 30, 2016).

This interpretation is further reinforced by the limitation on waivers of the right to counsel. RCW 10.77.020(1). A court will not accept a waiver unless the court makes a “specific finding” of competence, guided by consideration of the patient’s understanding of the proceedings. RCW 10.77.020(1).

The legislature has taken these steps to ensure the rights of people who may have special difficulties navigating the legal system on their own. People who are “subject to the provisions of [Chapter 10.77 RCW]” include those who may have a “mental disease or defect” or who may be legally incompetent or developmentally disabled. RCW 9A.12.010; RCW 10.77.060; RCW 10.77.095.

The state’s commitment to ensure the rights of its most vulnerable citizens, even when accused of a crime, is reflected in this statute’s broad and comprehensive right to appointed counsel at “any and all stages of the proceedings.” RCW 10.77.020(1). It is only with the assistance of counsel at “any and all stages of the proceedings” that patients can be assured they will be treated justly. RCW 10.77.020(1).

Mr. Fletcher had a right to appointed counsel at “any and all stages of the proceedings.” RCW 10.77.020(1). Administrative applications under RCW 10.77.150(1) and petitions under RCW 10.77.200(5) are both

“stages” of the “proceedings.” *Id.* Regardless of how Mr. Fletcher wished to proceed, he was entitled to the assistance of appointed counsel.

- B. The phrase “any and all stages of the proceedings” encompasses both administrative applications to the secretary and petitions to the court.
 - 1. When seeking conditional release, a patient may either apply to the secretary under RCW 10.77.150(1) or petition the court under RCW 10.77.200(5).

A patient detained pursuant to RCW 10.77 has two statutory avenues for seeking conditional release.⁶ Both statutory avenues are “stages of the proceedings.” RCW 10.77.020(1).

First, the patient “may make application to the secretary.” RCW 10.77.150(1). The secretary must forward the request to the committing court along with a recommendation and any proposed conditions. RCW 10.77.150(1). Under this avenue for pursuing conditional release, the court must schedule a hearing if the secretary supports the application. RCW 10.77.150(3)(a). The court *may* schedule a hearing even if the secretary recommends against conditional release. RCW 10.77.150(3)(a). At the hearing, “[t]he issue to be determined... is whether or not the person may be released conditionally without substantial danger to other persons, or

⁶ In addition to the two statutory avenues, a patient may seek a writ of habeas corpus. RCW 10.77.200(6). Release may also come at the behest of the secretary. RCW 10.77.150(2); RCW 10.77.200(1).

substantial likelihood of committing criminal acts jeopardizing public safety or security.” RCW 10.77.150(3)(c).

The second avenue for conditional release involves petitioning the superior court directly. RCW 10.77.200(5).⁷ The statute outlines the procedure for initiating such a proceeding:

Nothing contained in this chapter shall prohibit the patient from petitioning the court for release or conditional release from the institution in which he or she is committed. The petition shall be served upon the court, the prosecuting attorney, and the secretary.

RCW 10.77.200(5). Upon receipt of a petition, the secretary must develop and provide the court a recommendation. RCW 10.77.200(5).⁸ The court must then conduct proceedings to determine if unconditional or conditional release is appropriate. RCW 10.77.200(5).

Neither the trial judge nor the Court of Appeals majority discussed Mr. Fletcher’s right to directly petition the court under RCW 10.77.200(5). CP 6; Majority Opinion, pp. 4-8. Instead, both implied that Mr. Fletcher’s

⁷ The other subsections of RCW 10.77.200 parallel section .150, and outline a mechanism for applying to the secretary for unconditional release.

⁸ The Court of Appeals majority found “[t]he critical importance of the secretary’s recommendation” under RCW 10.77.150 dispositive of Mr. Fletcher’s request for counsel. Majority Opinion, pp. 5-6. Under RCW 10.77.150, the secretary’s recommendation determines the need for a hearing and the burden of proof at such a hearing. Majority Opinion, pp. 5-6. The majority did not mention that RCW 10.77.200(5) also requires the secretary to develop a recommendation where the patient petitions the court directly.

sole option for seeking conditional release was to apply to the secretary under RCW 10.77.150. Majority Opinion, pp. 4-8.⁹

However, the statute is unambiguous. Its plain language provides patients the right to seek conditional release directly from the court. RCW 10.77.200(5). This plain language controls. *Williams*, 171 Wn.2d at 477; *Christensen*, 153 Wn.2d at 194. It shows the legislature’s intent to allow a patient to initiate proceedings without waiting for the department to act. RCW 10.77.200(5); *see also State v. Howland*, 180 Wn. App. 196, 321 P.3d 303 (2014).¹⁰

The statute allows a patient to obtain judicial review, even where DSHS disagrees with the desire for conditional release. RCW 10.77.200(5). By contrast, the administrative route only requires a court hearing when the department approves an application for conditional release. RCW 10.77.150(3).¹¹

Both avenues—application to the secretary and petitioning the court directly—are “stages of the proceedings.” RCW 10.77.020(1).

⁹ The majority addressed only RCW 10.77.150, and did not even mention RCW 10.77.200 except to say that it “provides a parallel process for final release.” Majority Opinion, p. 4 n. 5. The dissent also failed to discuss RCW 10.77.200. Dissenting Opinion, pp. 1-14.

¹⁰ *Howland* involved discretionary review of a trial court’s decision dismissing a petition for conditional release. The *Howland* court did not suggest that patients have no right to directly petition the court for conditional release. *Id.*

¹¹ Where the department disapproves an application, the court *may* hold a hearing. RCW 10.77.150(3).

Whether seeking to apply to the secretary or petition the court directly, patients are entitled to the appointment of counsel.¹² RCW 10.77.020(1).

2. Patients are entitled to the assistance of counsel to initiate proceedings through an application to the secretary or a petition to the court.

The obligation to provide counsel at “any and all stages of the proceedings” requires the court to appoint counsel to *initiate* an administrative application or a petition to the court. RCW 10.77.020(1). The preparation of an administrative application and the filing of a petition are both “stages” of the proceedings: each is a “single step” in the “series of activities or events” that can lead to conditional release. *See Dictionary.com.*

A patient must be allowed to request the appointment of counsel, even when no court hearings are pending.¹³ Contrary to the trial court’s reading, the statute does not require patients to first make a *pro se*

¹² The Court of Appeals majority found that Mr. Fletcher had no right to counsel because he “was not acting within the statutory process for obtaining a hearing.” Majority Opinion, p. 1; *see also* p. 6. According to the majority, “a request to the court, bypassing DSHS,” is “not contemplated by the statute.” Majority Opinion, p. 7. The majority made no mention of RCW 10.77.200 except to say that it “provides a parallel process for final release.” Majority Opinion, p. 4 n. 5. The dissent also failed to discuss RCW 10.77.200.

¹³ Without the assistance of counsel, patients are at the mercy of a large bureaucracy. The fact that the department reviews each case every six months does not change this. *See* RCW 10.77.140. An attorney can help a patient obtain a favorable recommendation by bringing to the department’s attention information that otherwise might be overlooked and by advocating for conditional release.

application or file a *pro se* petition before a court may appoint an attorney.
CP 6.

The statutory entitlement to counsel would be meaningless if counsel could not assist in the preparation of an administrative application or the drafting of a petition. Even with the assistance of counsel, it is difficult to obtain conditional release. *See Howland*, 180 Wn. App. at 198, 200, 204. In *Howland*, the trial court summarily dismissed the patient's petition for conditional release as frivolous because it was unsupported by expert opinion.¹⁴ *Id.*

The assistance of counsel ensures a patient's case is properly presented to the secretary (through an administrative application) or the court (through a petition). Without an attorney, a patient is unlikely to persuade the secretary and is unlikely to obtain judicial review.

In Mr. Fletcher's case, for example, an attorney could have filed a proper petition and clarified the court's obligation to conduct a proceeding under RCW 10.77.200(5). Had counsel been appointed and a proper petition filed, the trial court could have addressed Mr. Fletcher's request for conditional release on its merits, and there would have been no need for appellate litigation on the procedure to be followed.

¹⁴ In *Howland*, the patient did have an attorney to assist in the trial court.

Furthermore, it is only with the assistance of an attorney that a patient can secure other statutory rights. These include the right to have counsel present at any evaluation and the assistance of an independent expert. *See* RCW 10.77.020(2), (3).

Here, the department conducts periodic examinations of Mr. Fletcher in the absence of counsel, despite his right to have an attorney present. RCW 10.77.020(2); RCW 10.77.140. And without counsel, Mr. Fletcher has no one to help him ask for appointment of an independent expert, as is his right under RCW 10.77.020(3) and RCW 10.77.140.

The assistance of an expert can be crucial. *See Howland*, 180 Wn. App. at 198, 200, 205, 208. In *Howland*, the Court of Appeals upheld the trial court's decision to summarily dismiss the patient's petition as frivolous. *Id.* The basis for the dismissal was the lack of expert evidence supporting the patient's request. *Id.*

Here, the absence of counsel left Mr. Fletcher in the same position as the patient in *Howland*. The Court of Appeals majority opined that "Mr. Fletcher was without any basis for arguing for conditional release since he had no expert opinion to support the request." Majority Opinion, p. 7.

Unrepresented patients committed to a state mental hospital cannot be expected to obtain the assistance of an independent expert on their own. And without counsel to help them secure an expert's assistance, patients

will not have an “expert opinion to support the request” for conditional release. Majority Opinion, p. 7. Furthermore, without an independent expert opinion, a patient is unlikely to persuade the secretary to grant an administrative application for conditional release. This leaves patients in limbo, chasing the court’s circular logic.

Without counsel and without expert assistance, Mr. Fletcher is at the mercy of a very large bureaucracy that is straining to handle the mental health needs of the criminal justice system. In the absence of a proper petition, Mr. Fletcher has no right to a hearing unless the secretary recommends conditional release. RCW 10.77.150(3)(a).¹⁵ And without counsel or an expert of his own, he is unlikely to file a proper petition or persuade the secretary to recommend in favor of conditional release.

The language of RCW 10.77.020(1) is clear and unambiguous. The legislature has directed courts to appoint counsel “at any and all stages of the proceedings pursuant to [Chapter 10.77 RCW].” RCW 10.77.020(1). This requires appointment of counsel in Mr. Fletcher’s case. With the assistance of counsel, Mr. Fletcher can secure the help of an independent expert and either apply to the secretary or petition the court directly. RCW 10.77.150(1); RCW 10.77.200(5).

¹⁵ The court has discretion to schedule a hearing where the secretary recommends against release. RCW 10.77.150(3).

- C. RCW 10.77.020(1) is broader than similar statutes requiring appointment of counsel in other contexts.

The right secured by RCW 10.77.020(1) is even more comprehensive than the expansive right to counsel recognized by the Supreme Court in other contexts. This can be seen through examination of the operative language and the captions of comparable provisions.

The operative language here creates a right to counsel “at any and all stages of the proceedings.” RCW 10.77.020(1). By contrast, other similar statutes secure the right to counsel “at all stages of the proceedings” (RCW 71.09.050(1)), “in all proceedings under this chapter” (RCW 13.34.090(1)), and “[a]t all stages of a proceeding in which a child is alleged to be dependent.” RCW 13.34.090(2).

The Supreme Court has found these phrases—“all stages of the proceedings,” “all proceedings,” and “all stages of a proceeding”—to encompass more than just appointment of counsel for appearances in the trial court. This suggests that the broader statutory language at issue here—requiring counsel for “any and all stages of the proceedings”—protects a right to counsel that is even more extensive. RCW 10.77.020(1).

In *Kistenmacher*, for example, the court considered the right to counsel at “all stages of the proceedings” in civil commitment cases. *Kistenmacher*, 163 Wn.2d at 171; RCW 71.09.050(1). The court found the

phrase expansive enough to include representation at a pre-commitment forensic examination by a state expert. *Id.* The court reasoned the examination was one of only a few “specific events set forth in the chapter that the legislature might have explicitly considered to be ‘proceedings.’” *Id.*

Similarly, here, the phrase “any and all stages of the proceedings” must, at the very least, encompass the events mentioned by the statute. *Id.* These events include administrative applications for conditional release (RCW 10.77.150(1)) and petitions “for release or conditional release” under RCW 10.77.200(5). As in *Kistenmacher*, the “specific events set forth in the chapter” should be considered stages of the proceedings under Chapter 10.77 RCW. *Id.*

The Supreme Court has also interpreted “all stages of the proceedings” to require appointment of counsel for appeal or discretionary review of trial court decisions in civil commitment cases.¹⁶ *In re Grove*, 127 Wn.2d 221, 233-236, 897 P.2d 1252 (1995). As *Kistenmacher* and *Grove* show, the “stages of the proceedings” are not merely those events that occur in the trial court’s courtroom. *Id.*

¹⁶ The State has not challenged the appointment of appellate counsel to pursue Mr. Fletcher’s case on review. Nor has the State moved to modify the Commissioner’s ruling on appealability.

Similarly, parents in dependency and termination cases have the right to counsel “in all proceedings under this chapter” and “[a]t all stages of a proceeding in which a child is alleged to be dependent.” RCW 13.34.090(1) and (2). As with civil commitment cases, this statute requires appointment of counsel for appeal or discretionary review of trial court decisions. *Grove*, 127 Wn.2d at 233-236. In addition, the statute provides parents the right to appointed counsel in nonparental custody actions when a dependency court grants concurrent jurisdiction to family court. *In re Dependency of E.H.*, 158 Wn. App. 757, 768, 243 P.3d 160 (2010).

The operative language applicable to Mr. Fletcher is even broader than that used in Chapters 13.34 and 71.09 RCW. By promising appointment of counsel at “*any and all* stages” rather than merely “all stages,” the legislature signaled its intent to create a comprehensive and all-encompassing right to appointed counsel for those patients who have been found not guilty by reason of insanity. RCW 10.77.020(1).

The statute’s heading confirms this. RCW 10.77.020 is captioned “Rights of person *under this chapter*.” RCW 10.77.020 (emphasis added). The caption’s broad reference to “this chapter” suggests the legislature did not intend to impose limitations on the right to appointment of counsel. *Cf. In re Petersen*, 138 Wn.2d 70, 92, 980 P.2d 1204 (1999).

In *Petersen*, the court noted that the right to counsel appeared in a section titled “Trial – Rights of parties.” *Id.* The *Petersen* court found no right to counsel for post-commitment forensic interviews, in part because of that reference to “trial” in the statute’s heading. *Id.* In *Kistenmacher*, by contrast, the court found a right to counsel at the pre-commitment evaluation, based in part on the heading’s reference to “trial.” *Kistenmacher*, 163 Wn.2d at 179.

Here, the right to counsel “under this chapter” signals the legislature’s intent to create a right encompassing *all* proceedings under Chapter 10.77 RCW rather than merely those involving trial or other court hearings.

Upon receipt of Mr. Fletcher’s letter and his “Motion for Conditional Release and for Appointment of Public Defender,” the trial court was obligated to appoint counsel. RCW 10.77.020(1). This is so whether Mr. Fletcher intended to apply to the Secretary under RCW 10.77.150(1) or to petition the court directly under RCW 10.77.200(5).

The trial court refused to even consider appointing counsel unless Mr. Fletcher first applied to the secretary for conditional release. CP 6. This violated Mr. Fletcher’s right to the appointment of counsel at “any and all stages of the proceedings.” RCW 10.77.020(1).

Without counsel, Mr. Fletcher had no one to help him apply to the secretary under RCW 10.77.150(1). Nor could he get legal help in his efforts to petition directly in the superior court under RCW 10.77.200(5).

Mr. Fletcher has a right to counsel at “any and all stages of the proceedings.” RCW 10.77.020(1). The plain unambiguous language of RCW 10.77.020(1) reveals the legislature’s intent to provide counsel at every possible step of a case that is governed by Chapter 10.77 RCW. Even if, as the trial judge believed, Mr. Fletcher used the wrong procedure for seeking conditional release, he was entitled to the assistance of counsel.

The Court of Appeals opinion must be reversed. The trial court’s decision must be vacated and the case remanded for appointment of counsel to help Mr. Fletcher pursue conditional release, either by applying to the secretary or by petitioning the court. RCW 10.77.020(1).

CONCLUSION

The Supreme Court should reverse the Court of Appeals, vacate the trial court's decision, and remand the case with instructions to appoint counsel to assist Mr. Fletcher in his quest for conditional release.

Respectfully submitted on July 28, 2017.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22917
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Petitioner's Supplemental Brief, postage prepaid, to:

Charles Fletcher
c/o Eastern State Hospital
PO Box 800
Medical Lake, WA 99022

With the permission of the recipient(s), I delivered an electronic version of the brief to:

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org
JKaufman@spokanecounty.org

I filed the Supplemental Brief electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on July 28, 2017.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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Address:

PO BOX 6490

OLYMPIA, WA, 98507-6490

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